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10 Attorneys for Defendant
SKILLSOFT CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IP LEARN, LLC,

Plaintiff,

V.

SKILLSOFT CORPORATION, and DOES 1-10.

Defendants

Civil Action No. C 02-02632 MJJ

**DEFENDANT SKILLSOFT
CORPORATION'S NOTICE OF
MOTION AND MOTION TO DISMISS
FIRST AMENDED COMPLAINT OR, IN
THE ALTERNATIVE, FOR A MORE
DEFINITE STATEMENT, AND
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: September 10, 2002

Time: 9:30 a.m.

TO IP LEARN, LLC AND ITS COUNSEL OF RECORD:

24 PLEASE TAKE NOTICE that on Tuesday, September 10, 2002, at 9:30 a.m., or as soon
25 thereafter as this matter may be heard, in Courtroom 11 of the United States District Court for the
26 Northern District of California, San Francisco Division, located on the 19th floor at 450 Golden
27 Gate Avenue, San Francisco, California 94102, the Honorable Martin J. Jenkins presiding,
28 defendant SkillSoft Corporation (“SkillSoft”), by and through its attorneys, will and hereby does

**SKILLSOFT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT
Case No. C 02-02632 MJJ**

1 move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing
 2 Plaintiff IP Learn, LLC's ("IP Learn") First Amended Complaint in its entirety for failure to state a
 3 claim upon which relief can be granted or, in the alternative, pursuant to Rule 12(e) of the Federal
 4 Rules of Civil Procedure, for a more definite statement.

5 SkillSoft bases its motion on IP Learn's failure to allege even the barest of facts to provide
 6 notice of its claims for patent infringement. IP Learn's complaint does not specifically, or even
 7 generally, accuse any particular SkillSoft products of infringement or identify which of more than
 8 240 patent claims are being infringed. The complaint, therefore, fails to meet even the simple
 9 requirements for pleading patent infringement set forth in the sample patent infringement complaint
 10 in Form 16 of the Appendix of Forms to the Federal Rules of Civil Procedure. Moreover, even if
 11 IP Learn's complaint is found to somehow meet the liberal notice pleading requirements, its
 12 infringement allegations are so vague and ambiguous that SkillSoft cannot reasonably frame a
 13 responsive pleading without engaging in an onerous and extraordinarily time consuming
 14 comparison of the potentially more than 240 claims of the patents-in-suit against SkillSoft's entire
 15 product line.

16 Assuming that IP Learn engaged in a sufficient investigation prior to filing its complaint, and
 17 compared SkillSoft products against the claims of the patents-in-suit, IP Learn should be able to
 18 easily identify which SkillSoft products allegedly infringe which claims of IP Learn's patents.¹
 19 SkillSoft is entitled to fair notice of the grounds for IP Learn's claims which, if "fair notice" means
 20 anything, must include the identity of the SkillSoft products accused of infringement and
 21 identification of which of more than 240 patent claims are allegedly being infringed. Requiring
 22 SkillSoft to analyze more than 240 patent claims against all of SkillSoft's products is unnecessarily
 23 burdensome and unfair.

24

25 1. In the context of patent infringement actions, a sufficient pre-filing investigation requires "that an
 26 attorney interpret the pertinent claims of the patent in issue before filing a complaint alleging patent
 27 infringement" and that an attorney who files a patent infringement action compare "the accused device
 28 with the construed patent claims." *Antonious v. Spalding & Evenflo Cos., Inc.*, 275 F.3d 1066, 1072
 (Fed. Cir. 2002). If Plaintiff's counsel satisfied these requirements, it should be able to easily provide
 SkillSoft with the information sought herein.

1 In further support of this Notice of Motion and Motion, SkillSoft submits the accompanying
2 Memorandum of Points and Authorities in Support thereof, and further bases its motion on all
3 pleadings and papers filed in this action, and upon such other matters as may be presented to the
4 Court at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF ISSUES

7 1. Whether IP Learn's amended complaint for infringement of five patents, together
8 having over 240 claims should be dismissed where it does not specifically, or even generally,
9 accuse any particular SkillSoft products of infringement of any particular claim in five different
10 patents, but rather accuses SkillSoft's entire product line?

11 2. Whether SkillSoft is entitled to a more definite statement of Plaintiff's infringement
12 claims when SkillSoft cannot reasonably frame a responsive pleading to IP Learn's amended
13 complaint for infringement of five patents having over 240 claims that does not specifically, or
14 even generally, accuse any SkillSoft products of infringement of any particular claim or claims in
15 five different patents?

BACKGROUND

17 SkillSoft Corporation is a provider of comprehensive, integrated e-learning products
18 delivered via the world wide web or company intranets. Its business skills courseware library of
19 over 1,600 titles covers areas such as finance, leadership, customer service and project
20 management. SkillSoft uses proven architectural and instructional design methodologies to ensure
21 its courses are designed to accelerate the ability of a workforce to master business and technology
22 skills. IP Learn, on information and belief, is a “technology licensing” company. SkillSoft is
23 unaware of any products made, or services offered, by IP Learn.

24 On May 31, 2002, IP Learn sued SkillSoft for infringement of U.S. Patent No. 6,126,448,
25 U.S. Patent No. 6,118,973, U.S. Patent No. 5,934,909, and U.S. Patent No. 5,779,486. On June 7,
26 2002, IP Learn amended its complaint to add an additional allegation of infringement of another
27 patent, U.S. Patent No. 6,398,556. SkillSoft was served with IP Learn's amended complaint on
28 July 1, 2002.

ARGUMENT

I. IP Learn's First Amended Complaint Fails to Meet Even the Bare Standards of Notice Pleading.

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of an action if the complaint fails “to state a claim upon which relief may be granted.” Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) requires that SkillSoft be given “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *See Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 960 (S.D. Cal. 1996) quoting *Conley v. Gibson* 355 U.S. 41, 47 (1957); see also Fed. R. Civ. P. 8(a).

“A complaint may be dismissed as a matter of law for one of two reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim.” *Robertson v. Dean Witter Reynolds, Inc.*, 749, F.2d 530, 533-34 (9th Cir. 1984); *see also OKI Elec. Indus. Co., Ltd. v. LG Semicon Co., Ltd.*, 1998 U.S. Dist. LEXIS 22507, *4-5 (N.D. Cal. Feb. 25, 1998). A complaint for patent infringement must set forth at least as much information as is contained in Form 16 of the Appendix of Forms to the Federal Rules of Civil Procedure to withstand Rule 12(b)(6) or Rule 12(e) motions. *See OKI Elec. Indus. Co., Ltd* at *9-10; Fed. R. Civ. P. 84 and Form 16. Because IP Learn has failed to plead sufficient facts in support of its infringement claim, its complaint should be dismissed in its entirety.

IP Learn’s First Amended Complaint fails to specifically, or even generally, accuse any particular SkillSoft products of infringement of any of the more than 240 claims in the five patents which have allegedly been infringed. As a result, the complaint fails to satisfy even the liberal notice pleading standard as set forth in sample Form 16. For example, the third paragraph of Form 16 requires that the plaintiff allege that the defendant has been and still is infringing the patent by making, selling and using “electronic motors embodying the patented invention.” Fed. R. Civ. P. Form 16. This is a clear requirement that a patent infringement Plaintiff identify, at the very least, the defendant’s products which allegedly infringe the Plaintiff’s patents. IP Learn’s complaint fails even the most basic requirement of Form 16.

In its First Amended Complaint, IP Learn alleges:

On information and belief, Defendant, with full knowledge of IP Learn's rights, is infringing the '448 patent, the '973 patent, the '909 patent, the '486 patent and/or the

1 ‘556 patent by making, offering for sale, selling, and using the inventions patented in
 2 the ‘448 patent, the ‘973 patent, the ‘909 patent, the ‘486 patent and the ‘556 patent
 3 within the United States and/or importing into the United States *inventions patented*
 in the ‘448, the ‘973 patent, the ‘909 patent, the ‘486 patent and/or the ‘556 patent.

4 First Amended Complaint at ¶11 (emphasis added). Unlike the allegation “electronic motors
 5 embodying the patented invention” in sample Form 16, IP Learn’s vague allegation “inventions
 6 patented in” the patents-in-suit does not indicate which of SkillSoft products, if any, are being
 7 accused of infringement and, as a result, does not provide fair notice of the grounds on which IP
 8 Learn basis its complaint. *See Gen-Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 960 (S.D.
 9 Cal. 1996) (vague reference to “products and/or kits” fails to provide adequate notice); *see Ondeo*
 10 *Nalco Co. v. EKA Chemicals, Inc.*, 2001 U.S. Dist. LEXIS 24217, *4-5 (D. Del. Aug. 10, 2001)
 11 (vague reference to plaintiff-counterclaimant’s “products” does not satisfy Rule 8(a)).²

12 The case law confirms that IP Learn is required to identify the allegedly infringing SkillSoft
 13 product in its complaint. In *Gen-Probe*, for example, defendant Amoco moved to dismiss plaintiff
 14 Gen-Probe’s patent infringement claims for failure to state a claim upon which relief may be
 15 granted. *See Gen-Probe, Inc.*, 926 F. Supp. at 960-962. The court dismissed most of Gen-Probes’
 16 claims, instructing Gen-Probe to revise its complaint as follows:

17 The supporting allegations must provide the basis for the claims, keeping in mind
 18 Rule 11’s requirement of an inquiry reasonable under the circumstances. Filing a
 19 patent infringement action pointing vaguely to “products and/or kits” (P 58 and 65)
 does not provide adequate notice as required by the Rules, and does not reflect the
 reasonably inquiry required under the Rules.

20 *Id.* at 962. IP Learn’s allegations are as deficient as those dismissed in *Gen-Probe*.

21 Similarly, in *Ondeo Nalco*, defendant EKA filed a patent infringement counterclaim that
 22 plaintiff Nalco moved to dismiss pursuant to Rule 12(b)(6) for failure to provide fair notice. *See*
 23 *Ondeo Nalco Co.*, 2001 U.S. Dist. LEXIS 24217 at *2-3. Specifically, Nalco asserted that EKA’s

24 2. By contrast, in cases in this district denying Rule 12(b)(6) motions to dismiss for failure to specify
 25 particular facts in support an infringement claim, the non-movants identified the defendant’s accused
 26 products with much greater specificity than IP Learn. *See, e.g., OKI Elec. Indus. Co.*, 1998 U.S. Dist.
 27 LEXIS 22507 at *9-11 (reference to “devices that embody the patented methods, including 4 megabit
 and higher density DRAMs” satisfies Rule 8(a)); *see also Dome Patent, L.P. v. Permeable Tech., Inc.*,
 (W.D. N.Y. 1999) (reference to “silicone-acrylate contact lenses embodying oxygen-permeable cross-
 linkers” sets forth as much information as Federal Form 16 and is sufficient to withstand Rule 12(b)(6)
 or Rule 12(e) motions).

1 counterclaim “insufficiently identif[ied] which products are accused of infringement” where it
 2 alleged infringing products as “Nalco’s products, including the 8692 product” that are “used in the
 3 paper-making process.” *Id.* at *2-3, *3 n. 2. The Court granted Nalco’s motion and dismissed the
 4 counterclaim. *Id.* at *1.

5 IP Learn’s allegation “inventions patent in” the patents-in-suit is even more vague than the
 6 “products and/or kits” or “Nalco’s products, including the 8692 product,” allegations which were
 7 found to be insufficient in *Gen-Probe* and *Ondeo Nalco*. IP Learn’s complaint does not satisfy the
 8 pleading requirements of either Rule 8(a) or Form 16, and thus should be dismissed.

9 **II. IP Learn’s Amended Complaint For Infringement Is So Vague That SkillSoft Cannot
 10 Reasonably Frame A Responsive Pleading.**

11 Federal Rule of Civil Procedure 12(e) provides that “if a pleading . . . is so vague or
 12 ambiguous that a party cannot reasonably be required to frame a responsive pleading the party may
 13 move for a more definite statement before interposing a responsive pleading.” Fed. R. Civ. P.
 14 12(e). SkillSoft cannot reasonably be required to frame a responsive pleading to IP Learn’s
 15 amended complaint for infringement of five patents – having over 240 claims – that does not
 16 specifically accuse any SkillSoft products of infringement or identify specifically which claims are
 17 allegedly infringed. Instead IP Learn’s complaint insufficiently accuses SkillSoft’s entire product
 18 line of infringing the entirety of the five patents-in-suit having more than 240 claims among them.
 19 *See In re Papst Licensing GmbH Patent Litigation*, 2001 U.S. Dist. LEXIS 2255, *3-4 (E.D. La.
 20 Feb. 22, 2001). Thus, as an alternative to its motion to dismiss, SkillSoft requests that, at the very
 21 least, this Court order IP Learn to provide a more definite statement of its claims against SkillSoft
 22 pursuant to Rule 12(e) before SkillSoft is required to respond to IP Learn’s First Amended
 23 Complaint.

24 In *Papst*, plaintiff Papst filed a complaint for patent infringement against defendant IBM
 25 alleging that IBM sold “products that embody the elements of at least one claim” of twenty patents
 26 identified in the complaint. *Id.* at *2. IBM moved for a more definite statement under Rule 12(e)
 27 arguing that to respond to plaintiff Papst’s complaint for patent infringement would require it to
 28 compare 503 patent claims against IBM’s numerous hard disk drives. *Id.* at *2-4. Papst countered

1 that its complaint complied with the sample patent infringement complaint provided in Federal
 2 Form 16. *Id.* The court rejected Papst's argument and granted the motion stating:

3 It is apparent, however, that the number of patents and products in the case before
 4 me are far greater than those contemplated in the sample complaint, which would
 justify a request for greater specificity.

5 *Id.*³ Similarly, IP Learn's failure to identify which of the more than 240 claims in the five patents at
 6 issue are being infringed by SkillSoft, or to identify which of SkillSoft's products allegedly infringe
 7 this morass of claims, justifies granting SkillSoft's motion requiring IP Learn to prepare a more
 8 definite statement of its patent infringement claims against SkillSoft. SkillSoft should not be put to
 9 the burden of analyzing literally hundreds of claims that may or may not even be at issue against
 10 many products that may also not be at issue in order to respond to the First Amended Complaint.⁴

CONCLUSION

12 For all the reasons set forth herein, SkillSoft respectfully requests that the Court dismiss IP
 13 Learn's First Amended Complaint in its entirety or, in the alternative, grant SkillSoft's motion

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18 ///

23 3. By contrast, in cases in this district denying Rule 12(e) motions for more definite statement, the non-
 24 movants identified the defendant's accused products with much greater specificity than IP Learn. *See,*
 25 *e.g., Intel Corp. v. Hyundai Elec. America, Inc.*, 1987 U.S. Dist. LEXIS 14727 (N.D. Cal. Nov. 23,
 1987) (reference to "semiconductor memory products, specifically Erasable Programmable Read Only
 26 Memories (EPROMs), and products that incorporate EPROMs" sufficient to withstand Rule 12(e)
 challenge).

27 4. SkillSoft is cognizant of this Court's Patent Local Rules requiring disclosure of asserted claims and
 28 infringement contentions. However, those disclosures are due 10 days after the October 8, 2002 Initial
 Case Management Conference, substantially after SkillSoft is required to file its responsive pleading.

1 for more definite statement and require IP Learn to specify which SkillSoft products allegedly
2 infringe which claims of the patents-in-suit.

3 Dated: July 22, 2002

FENWICK & WEST LLP

4 By: s/Claude M. Stern

5 Attorneys for Defendant
6 SKILLSOFT CORPORATION

7

8 **LOCAL RULE 3-16 CERTIFICATION**

9

10 Pursuant to Civil L. R. 3-16, the undersigned certifies that the following listed persons,
11 associations of persons, firms, partnerships, corporations (including parent corporations) or other
12 entities (i) have a financial interest in the subject matter in controversy or in a party to the
proceeding, (ii) have a non-financial interest in that subject matter or in a party that could be
substantially affected by the outcome of this proceeding:

13 [1] SmartForce, Inc.

14 [2] Warburg, Pincus Ventures L.L.P.

15 Dated: July 22, 2002

FENWICK & WEST LLP

16 By: s/Claude M. Stern

17 Attorneys for Defendant
18 SKILLSOFT CORPORATION